

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 414 - September Term, 1975

(Argued January 30, 1976 Decided March 2, 1976)

Docket No. 75-6063

J.C.B. SUPER MARKETS, INC.

Plaintiff-Appellant

-against-

UNITED STATES OF AMERICA, and

UNITED STATES DEPARTMENT OF AGRICULTURE

Defendants-Appellees

PETITION FOR REHEARING AND PETITION FOR RELIEF FROM
JUDGMENT PURSUANT TO RULE 60(b)

HODGSON, RESS, ANDREWS, WOODS & GOODYEAR
1800 ONE M & T PLAZA
BUFFALO, N. Y. 14203

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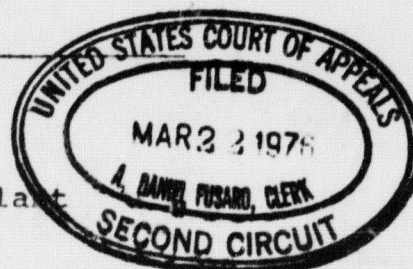
J.C.B. SUPER MARKETS, INC.

Plaintiff-Appellant

-against-

UNITED STATES OF AMERICA, and
UNITED STATES DEPARTMENT OF AGRICULTURE

Defendants-Appellees



PETITION FOR REHEARING, AND PETITION FOR RELIEF FROM
JUDGMENT, AND FOR REMAND TO DISTRICT COURT FOR FURTHER
HEARING

J.C.B. Super Markets, Inc. hereby petitions the United States Court of Appeals for the Second Circuit for a rehearing of this appeal.

J.C.B. Super Markets, Inc. further petitions the United States Court of Appeals for the Second Circuit for relief from the final judgment herein, and from the affirmance thereof by this Court, pursuant to the provisions of Rule 60(b), and for a remand of said case to the United States District Court for the Western District of New York for a further hearing, pursuant to the provisions of Subdivisions 2 and 5 of Rule 60(b), all as more fully set forth in the petition annexed hereto.

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HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR

By

John R. Russell Jr.
Attorneys for Petitioner
J.C.B. Super Markets, Inc.
Office and Post Office Address
1800 - One M & T Plaza
Buffalo, New York 14203

TO: A. Daniel Fussaro, Clerk
Court of Appeals for the Second Circuit
Foley Square
U.S. Court House
New York, New York 10007

Richard J. Arcara, Esq.
United States Attorney for the
Western District of New York
U.S. Court House
Buffalo, New York 14202

Attention: Theodore J. Burns, Esq.
Assistant U.S. Attorney

MILLERS FALLS
EXPRESS
COTTON CONTENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 414 - September Term, 1975

(Argued January 30, 1976 Decided March 2, 1976)

Docket No. 75-6063

J.C.B. SUPER MARKETS, INC.

Plaintiff-Appellant

-against-

UNITED STATES OF AMERICA, and
UNITED STATES DEPARTMENT OF AGRICULTURE

Defendants-Appellees

PETITION OF J.C.B. SUPER MARKETS, INC.

STATE OF NEW YORK)
COUNTY OF ERIE : SS.
CITY OF BUFFALO)

JOSEPH T. PERNA, being first duly sworn, deposes and says:

I am, and at all times hereinafter mentioned have been, President of J.C.B. Super Markets, Inc. This petition is submitted in behalf of J.C.B. Super Markets, Inc.

This case arose under 7 USC §2022 in the United States District Court for the Western District of New York, wherein J.C.B. Super Markets,

Inc. (hereinafter J.C.B.) sought judicial review of its disqualification by the United States Department of Agriculture (hereinafter USDA) from participation in the Food Stamp Program for a period of 30 days, because of violations by J.C.B. in accepting food stamps for non-food items.

The disqualification was originally imposed by USDA because of certain alleged improper sales made by various personnel of J.C.B. on March 25, 26 and 27, 1969. A 30-day suspension of J.C.B.'s rights to deal in food stamps was decreed by USDA in the latter part of 1969. J.C.B. instituted this lawsuit for an injunction in the United States District Court for the Western District of New York in May, 1970. Thereafter, a trial de novo on the question of violation, and as to the extent of the penalty imposed, took place before Judge Curtin on July 30 and 31, 1973. Judge Curtin rendered his decision on June 10, 1975, dismissing plaintiff's complaint for an injunction. An appeal to this Court was thereafter taken by J.C.B., which was argued on January 30, 1976, and decided by this Court on March 2, 1976.

Petitioner hereby petitions the United States Court of Appeals for the Second Circuit for a hearing of this appeal. In the alternative, it hereby petitions the United States Court of Appeals for the Second Circuit for relief from the final judgment herein, and from the affirmance thereof by this Court, pursuant to the provisions of Rule 60(b), Federal Rules of Civil Procedure, and/or for a remand of said case to the United States District Court for the Western District of New York in order that it may consider this Rule 60(b) motion or, in the alternative, that it may

conduct a further hearing on the merits, and take testimony to determine whether the judgment should be set aside. It is respectfully submitted that such motion should be granted under the provisions of Rule 60(b)2 (newly discovered evidence) or under the provisions of Rule 60(b)5 (that it is no longer equitable that the judgment should have prospective application).

At the time that the violations charged are alleged to have taken place (early 1969), plaintiff was doing a reasonably heavy volume of food stamp business, (approximately 5%). The removal of even that volume would have been a serious blow and result in a loss of 10-15% of overall sales volume to J.C.B. Had the penalty as imposed been submitted to at that time, its effect on plaintiff, while very severe, could possibly have been put up with, although with considerable difficulty and would not necessarily have caused permanent inevitable damage to plaintiff. Plaintiff, since it felt that the imposition of the penalty was improper, quite properly chose to contest the same, by instituting this action, in May 1970. Under normal procedures, it was reasonable to expect that this case would be reached for trial in short order, and disposed of, so that the conditions which existed at the time of the original imposition of the penalty would still be somewhat the same.

As it turned out, due to a number of factors, none of which is particularly relevant here, this case was not reached for trial before Judge Curtin until July, 1973. At all times following the institution of the lawsuit, plaintiff remained ready for trial, as soon as the routine

pretrial discovery procedures had taken place.

This case was actually tried before Judge Curtin, without a jury, on July 30 and 31, 1973. At that time, testimony was offered before Judge Curtin that, by early 1973, about 10.5% of J.C.B.'s business was made up of food stamp sales, and that, in addition, the food stamp customers made substantial purchases using cash. I testified at that time that if J.C.B.'s right to sell merchandise to food stamp customers was suspended, J.C.B. would lose at least 30% of its gross sales during the suspension. I further testified to my fear that if the store was disqualified for a period of 30 days, it might not be able to stay in business at that location, and, if it did, it would take about a year to a year and a half to recover the lost sales volume.

Although this case was tried before Judge Curtin in July of 1973, his decision was not handed down until June 10, 1975, a period of upwards of 22 months. As this Court is aware, J.C.B. took an appeal from his decision to this Court, and Judge Curtin's decision was affirmed on March 2, 1976. During the time from July, 1973 when this case was tried, up to the present time, additional drastic changes have been taking place in plaintiff's overall situation.

During the first four weeks of February, 1976, J.C.B. had a gross sales volume of \$417,973.55. Of this gross amount, approximately 20%, or \$82,500, represented direct sales of food stamp items. Set out below are the actual sales figures for J.C.B. for the weeks ending February 7, 1976, February 14, 1976, February 21, 1976 and February 28, 1976.

WEEK ENDING	FOOD STAMPS	TOTAL SALES
2/7/76	\$36,600.00	\$121,614.56
2/14/76	11,200.00	91,997.10
2/21/76	23,200.00	106,517.89
2/28/76	11,500.00	97,844.00
	<u>\$82,500.00</u>	<u>\$417,973.55</u>

If J.C.B.'s right to sell merchandise to food stamp customers is suspended, it will lose, on a conservative estimate, at least 50% of its gross sales during that time. This estimate is based on my experience over the years, and based upon the amount of sales to food stamp customers who purchase eligible items with food stamps, when they have them, and who purchase both eligible and non-eligible items for cash when they do not, as opposed to the other customers who only make purchases for cash. The loss of approximately 50% of gross sales to J.C.B. for a period of 30 days would be absolutely catastrophic and an economic disaster.

I took over this store in March of 1968. I took it over from the former owners because they had found it to be a losing proposition. They were losing so much money that they simply decided that they could no longer continue at that location. At the time I took over the store I did so with the thought that, with a lot of hard work and a great deal of proper management, I could probably swing the store around and make it a profitable operation. At the time I bought the store from the former owners, they had accumulated a net loss at that location of approximately \$89,000. When I took over the store from them, I also bought their losses of \$89,000, and that loss figure, in the intervening eight years, has now increased to a total net loss of approximately \$160,000. For the

There is absolutely no way that this store can continue to operate without the use of its food stamp privileges. If these privileges are withdrawn, it will be necessary for J.C.B. to close its store, for as long as its food stamp privileges are withheld, and this will be done. Even without the additional penalty being imposed, with the great loss it entails, this store may not be able to continue in business where it is for financial reasons. I keep hoping that the situation at the store will improve, so that it becomes a profitable operation. This has not happened to date, and, if this penalty is imposed, it may never happen. At some point in time, it will be necessary to close this store down completely if these losses continue.

As previously indicated in the testimony in this case, this store is located in an economically depressed area of Buffalo, which has the second highest volume of food stamp recipients in all of Western New York. The vast majority of the people who patronize the store are in the lower economic level. A great many of them do not speak English. Because of the amount of illiteracy and the number of Spanish speaking people and the number of Italian speaking people who cannot read or write English, it would be physically impossible to educate these people and to have them understand the fact that they cannot use food stamps and that we cannot accept them.

Because of the area we are located in, I am afraid of the violence that could happen, if we tried to continue operating without food stamps. We have already experienced the problem of cashiers being slapped in the face, and having abusive language used to them, because the customer did not understand the reason why food stamps could not be accepted for various products. A large number of these people have food stamps, but do not really understand what they are for, and when they may or may not be properly used, and it is practically impossible to enlighten them. It is impossible to explain to a lot of these people why a bar of soap or a box of kleenex is not just as essential to their living conditions as the eligible food items. They cannot understand why the store cannot sell food items to them which are imported, as in the case of imported cans of ham. I fear that some of these people will actually become physically violent if the store should remain open and they are not able to redeem food stamps. This fear is based on my experiences in eight years at this location, in dealing personally with these people. Even if I were to remain open, I am certain that it would take me the full 30-day period of the suspension for my people to be able to educate the food stamp owners to the effect that they could not use food stamps to make purchases. It would be doubly difficult to make them understand, thereafter, that it might then be possible for them to again start using their food stamps to make purchases at the store. If the store's right to use food stamps is suspended, and the store is closed, approximately 80 people who now work at the store will be laid off for whatever period of time the store's food stamp privileges are suspended. Thereafter, these workers would only be rehired as my volume increased,

and this would take a substantial period of time. My present payroll at the store is approximately \$7,500 a week.

The practical result of closing this store will be to take an already sick financial store and shut it down completely for a period of 30 days, and as long thereafter as it takes to have the food stamp privileges reissued. It has been necessary, in the past, in order to keep this store going, to finance it from sources other than the income of the store itself. It has been a losing battle to date, and it will become even harder to continue if this food stamp suspension goes into effect. A time will come, if this trend continues, when it is no longer practical to remain in business.

This store is situated in a location where the store's customers are going to find it extremely difficult to withstand the penalty imposed on the store. At the present time, we have approximately 13,000 customers per week, which has grown from approximately 10,000 a week when I took over the store's operation. For one thing, we deal with a great volume of older customers, a great number of whom are either on Social Security or Welfare or both. They are customers who do not have cars of their own, and do their shopping by walking to the store. The only other somewhat comparable store in the immediate area is substantially smaller than J.C.B., and there is no way that they could handle the increased volume of business. For all practical purposes, this would mean that a large number of our elder customers would be without adequate service.

As this Court is aware, there has been a substantial worsening of the economy in the 22-month period of time between the time this case was argued before Judge Curtin, and when it was decided by him, and continuing to the present. In the Buffalo area, which is one of the most depressed areas in the State, the unemployment ratio is now at 14%. A large number of these unemployed people are concentrated in the general area where my store is located. This change in circumstances alone, while perhaps not fully considered by Judge Curtin because it was not specifically in the testimony before him, makes it all the more urgent that J.C.B. not lose its food stamp privileges.

It is respectfully submitted that it would no longer be equitable to give effect to the 30-day suspension of J.C.B.'s privileges to deal in food stamps, for all of the reasons set out above.

That this petition is made in good faith, and its resolution is of the utmost importance to petitioner. This is the only way known to petitioner to bring this new matter before the Court.

That this petition is made to this Court, rather than to the District Court, since it appears that the District Court lacks power to proceed with a Rule 60(b) motion which may be inconsistent with this Court's mandate.

I respectfully ask that this Court, in the interests of justice and equity, either grant a rehearing in the case before it; or that it refer the matter back to Judge Curtin so that he may conduct a

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full rehearing as to the inequities of enforcing this suspension; or that such other relief as may be appropriate under the circumstances be granted to petitioner.

J.C.B. SUPER MARKETS, INC.

By

Joseph T. Perna
Joseph T. Perna, President

Subscribed and sworn to
before me this 12th day
of March, 1976.

Grover R. James, Jr.
GROVER R. JAMES, JR.
Notary Public, State of New York
Qualified in Erie County
My Commission expires Mar. 30, 1977.